274(c)(2)(B) allows BOCs to use CPNI in teaming arrangements consistent with §222. Thus, BOCs can use CPNI with the type of telecommunications service from which the information was derived, and with customer authorization can use it with any service. Therefore, to the extent that "basic telephone service information" is also CPNI, the applicable rules will be those developed in CC Docket No. 96-115 in order to implement §222. Section 222 relates to only CPNI. To the extent the information is not CPNI, it is network information. Network information that a BOC shares with one electronic publisher with whom the BOC teams would be shared with others with whom the BOC teams. Moreover, BOCs are subject to various network disclosure requirements, including those in *Computer III* and §251(c)(5).

3. *BOCs Must Participate In Electronic Publishing Joint Ventures On A "Nonexclusive," But Not Nondiscriminatory, Basis (¶63)*

The right to participate in a joint venture on a "nonexclusive basis" means that the BOC or its affiliate cannot join a contract that would prohibit other parties from being added to the joint venture or that would prohibit the BOC or its affiliate from forming other joint ventures with other parties. A "nonexclusive basis" does not mean, however, that the BOC must agree to let everyone else into the joint venture, or that the BOC must agree to participate in other joint ventures. Since joint ventures, unlike teaming and other business arrangements, require BOC ownership,[19] it was wise of Congress not to create a nondiscrimination requirement for participation. It would be highly unreasonable to attempt to require BOCs to purchase ownership rights in other

[19] The definition of "electronic publishing joint venture" includes BOC ownership, which is defined in terms of an equity interest or right to share gross revenue of more than 10 percent. §274(i)(5) and (8).

joint ventures, or to require that others be let into the ventures that the BOCs partially own. Where ownership is involved, the BOC's discretion must be protected.

D. There Is No Need For New Nondiscrimination Safeguards (¶¶64-67)

1. Existing Safeguards Are Much More Than Is Needed (¶65)

The Commission asks whether the nonstructural safeguards of *Computer III* and *ONA* are consistent with the nondiscrimination requirements of §274(d). *NPRM*, para, 65. The nonstructural safeguards are consistent. Those safeguards, in addition to §202, however, are much more than is needed to implement the nondiscrimination requirements in §274(d). Unlike §272, §274 does not contain a general nondiscrimination requirement. Section 274(d) specifically requires that BOCs provide access and interconnection for basic telephone service at just and reasonable rates that are tariffed (so long as the rates are subject to regulation) and that meet a per unit pricing requirement. The Commission does not need the *Computer III* and *ONA* requirements to satisfy this section. Moreover, the Commission has never required both structural and nonstructural safeguards for interconnection. Requiring both would be particularly restrictive under §274 because it contains even more severe structural separation requirements than §272.[20] To the extent that the Commission decides that additional

[20] In response to the Commission's request for comments in the *Revision of Filing Requirements Proceeding*, we and other parties have recommended the elimination of the ONA installation, maintenance, and repair reports and affidavits. We have also recommended the consolidation into an annual report of 1) the ONA services User Guide, 2) a listing of new ONA service requests, and 3) a description of ONA service requests designated for further development. *Revision of Filing Requirements*, CC Docket No. 96-23, Comments of Pacific Bell and Nevada Bell, pp. 3-4, April 8, 1996. Our recommendations are consistent with the Commission's proposals to eliminate CPE reports. Moreover, the §274 separate affiliate requirements would make the addition of ONA and CEI requirements (including the filing of CEI plans) superfluous and unnecessarily burdensome for BOC offerings of electronic publishing services.

safeguards are needed, however, it should retain existing *Computer III* and *ONA* safeguards.

The existing safeguards have the advantage of being well understood and tested. They have worked well for years. With increased competition, there is less reason than ever for extra layers of new regulations and restrictions. Moreover, the creation of new restrictions would destroy the balance created by Congress between providing protection and encouraging competition, in order to bring new benefits to the public.

2. *Section 274(d) Does Not Require BOCs To File Tariffs For Services That No Longer Are Subject To Tariff Regulation (¶67)*

The requirement to provide access and interconnection "at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation)" means that, so long as they are subject to tariff regulation, the BOCs must offer them to electronic publishers on that basis. Congress did not require tariffing of previously detariffed services. That would be contrary to Congress's "pro-competitive, de-regulatory" goals.[21]

[21] *See NPRM* ¶1.

3. *Volume Discounts For Electronic Publishers Are Not Unlawful Under §274(d) (¶67)*

Volume discounts are not prohibited by the requirement to provide service at "rates that are tariffed and that are not higher on a per-unit basis than those charged for such services to any other electronic publisher or any separated affiliate engaged in electronic publishing." (emphasis added) The statute does not define "unit." Dictionary definitions of "unit" include a "group regarded as a distinct entity within a larger group." Thus, BOCs may continue to create reasonable units or groups of services. For instance, Pacific Bell provides transport in units of DSO, DS1, DS3, and DS3x3, which are priced for volume discounts, based on Pacific Bell's cost savings. Units could also be based on groups of minutes of use. So long as a BOC offers such units at prices that are not higher than those the BOC charges for the same units to any other electronic publisher or to any separated affiliate engaged in electronic publishing, the BOC has satisfied the requirement.

If Congress had meant to prohibit "volume discounts," it would have said so by using that term. Volume discounts have a long history at the FCC, and the FCC has found them to be a legitimate and valuable means of pricing.[22] Congress could not reasonably have ignored that history and chosen an indirect means of dealing with this pricing. Recently in CC Docket No. 96-98, the Commission found "that price differences, such as volume and term discounts, when based on legitimate variations in costs are permissible under the 1996 Act, if justified."[23]

---

[22] See, e.g., Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369, 7463, para. 199.

[23] *First Report and Order*, para. 860.

It also is unreasonable to believe that Congress would have created the tremendous arbitrage problem of prohibiting volume discounts solely for electronic publishers. This prohibition would give large entities a strong incentive not to be classified as electronic publishers and would be unenforceable and, thus, nonsensical.

IV. Telemessaging Service Is Subject To Section 260, Which The Commission Should Implement Via Existing Safeguards (¶¶75-77)

If the Commission decides, as it should, that telemessaging is not an information service subject to §272, a BOC providing telemessaging services would, of course, still be subject to the requirements of §260. Section 260 does not impose greater obligations on LECs providing telemessaging service than exist under §§201 and 202. The obligations of §260, however, are more specific and can be directly addressed via the existing *Computer III* and *ONA* requirements, which are entirely consistent with §260 and should be applied to all ILECs. No other requirements are needed to implement this section. These requirements provide sufficient protection against cross subsidy and discrimination, while allowing the public to obtain the efficiency benefits of BOC and other providers' integration of telemessaging and basic services.

The Commission's *Computer III* policy of encouraging BOC integration of enhanced services has been a huge public interest success, and it is with voice mail telemessaging services that this success has first come to fruition. The FCC began its integration policy ten years ago specifically because voice mail was not being provided to the mass market.[24] Voice mail was the first full-scale enhanced service provided by

[24] In 1986, the FCC found that structural separation requirements had "prevented consumers, and particularly small-business and residential consumers," from being offered network-based voice messaging services. *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket 85-229, *Phase I, Report and Order*, 104 FCC 2d 958, para. 90 (1986) ("*CI-III Phase I Report and*

BOCs.[25] With integration actually in place for less than eight years, the BOCs already are providing voice mail to millions of customers.[26] Moreover, in the years that the BOCs have provided voice mail under *Computer III* nonstructural safeguards, we know of no formal FCC complaints by ESPs concerning the BOCs' provision of this or other enhanced services or of any discrimination revealed by the BOCs' nondiscrimination reports filed with the FCC.[27] It is understandable that, in the face of this history, Congress would ensure against cross subsidy and discrimination in §260, without reducing the efficiency benefits by requiring additional restrictions. The ability to integrate telemessaging services under the 1996 Act will bring these services to even more consumers.

V. There Is No Need To Abandon Normal Complaint Procedures To Enforce Sections 260 and 274 (¶¶78-84)

A. Neither Shifting The Burden Of Proof Nor Other Procedural Changes Are Needed To Enforce Section 274 (¶¶78-80)

The NPRM asks for comment on the legal and evidentiary standards necessary to establish a violation of §274 and what specific acts or omissions are sufficient to state a *prima facie* claim for relief. *NPRM* ¶79. Section 274 includes many complex requirements relating to service provision, corporate structure, intercorporate transactions, joint activities with other parties and rates. The Commission and the industry have no practical experience with these requirements, many of which are unprecedented. Thus it would be premature at this time to attempt to simplify or

---

Order").

[25] *See, e.g., Pacific Bell and Nevada Bell Plan for the Provision of Voice Mail Services*, 3 FCC Rcd 1095 (1988). BOCs provided some protocol conversions prior to voice mail, but they were ancillary to other services.

[26] *See, e.g., Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, 10 FCC Rcd 8360, para. 37 (1995) ("*CI-III Further Remand NPRM*").

[27] *See id.* at para. 29.

condense the requirements into precepts about what constitutes a *prima facie* case. Instead, the Commission should deal with any complaints that may arise on an *ad hoc* basis, not prejudiced by a determination in this proceeding as to what constitutes a *prima facie* case. Moreover, given the illegality under the Administrative Procedure Act ("APA") of shifting the burden of proof, as indicated below, there is no need at this time to codify what constitutes a *prima facie* case.

The Commission also seeks comment on whether there are policy concerns that would justify shifting the burden of proof to defendant carriers in complaint proceedings under §274. *NPRM* ¶79. Nothing in the 1996 Act suggests that Congress intended to depart from normal complaint procedures for this section. Thus, the complainant should have the burden of establishing that the carrier violated §274; and this burden of proof should not, at any time in the proceeding, shift to the defendant carrier except in the case where the carrier advances an affirmative defense, where it must bear the burden of proof for that defense.

Section 7(c) of the APA is clear that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[28] Nothing in the Communications Act provides for shifting the burden of proof to the BOC. Moreover, one cannot find any implicit authority in the 1996 Act to shift the burden, as the Supreme Court would "not lightly presume exemptions to the APA."[29] Finally, the assignment of

---

[28] 5 U.S.C. §556(d).

[29] *Brownell v. Tom We Shung*, 352 U.S. 180, 185 (1956); *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 114 S. Ct. 2251, 2254 (1984)

burden of proof is a matter of substantive law, not merely a procedural matter that the Commission can implement without specific Congressional authority.[30] Hence, the APA controls. Specifically, the APA requires that the burden of persuasion, not simply the burden of establishing a *prima facie* case,[31] always be on the complainant.[32] Thus, if a complainant asserts that a BOC has violated §274, it must persuade the Commission of the truth of the propositions it asserts in order to prevail. At some point, the complainant may introduce sufficient evidence to establish a *prima facie* case. In this instance, the burden of going forward or the burden of producing evidence may shift to the BOC, but the complainant still must bear the "heavy burden of persuasion."[33] Only if the BOC chooses to assert an affirmative defense, *e.g.*, competitive necessity, reasonableness of the discrimination, or correction within 90 days of a violation discovered by a compliance review, would the BOC have the burden of proving the truth of its defense.

There is even less reason for the Commission to consider tampering with the burden of proof in this proceeding than in the *In-Region NPRM* (CC Docket No. 96-149). In the *In-Region NPRM*, the Commission also sought comment on the desirability of shifting the burden of proof with respect to cases brought under §§271 and 272. We submit that this proposal is misguided with respect to §§271 and 272.[34] Unlike

---

[30] *See American Dredging Co. v. Miller*, 114 S.Ct. 981, 988 (1994); 114 S. Ct. 2251, at 2254.

[31] *See Brosnam v. Brosnan*, 363 U.S. 345, 349 (1923).

[32] 114 S. Ct. 2251, at 2256-57. *Cf.* 47 U.S.C. §§309(e) and 312(d) (a party has *both* the "burden of proceeding with the introduction of evidence and the burden of proof").

[33] *Radio Corp. of America v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1, 7-8 (1934).

[34] *See* PTG Comments in CC Docket No. 96-149, pp. 41-43 (Aug. 15, 1996).

§271(d)(6)(B) which directs the Commission to establish complaint procedures and sets a 90-day deadline, §274(e) has no such requirements. Thus, there is no congressionally-imposed timetable that can be cited in an attempt to justify the burden shift.

Even if shifting the burden of proof were possible under the APA, it would not "advance[] the pro-competitive goals of the 1996 Act." *NPRM* ¶78. Any burden-shifting would provide too great a temptation for filing frivolous or anticompetitive complaints. Reducing the traditional pleading burden on complainants (which is already not onerous) is bound to lead to abuse. First, it should be noted that BOC competitors—often very large, sophisticated companies—are the most likely complainants. Such companies do not need unusual procedural relief from the normal burdens of litigation. Complaints, particularly if not constrained by the burden of proof, may be filed simply as fishing expeditions by competitors seeking access to information regarding a BOC's service offerings and practices. Competitors may also seek to pepper the BOCs with complaints in order to stymie competition. The improvement in the odds of success that a shift in the burden of proof would cause will invite such tactics.

The Commission, too, will suffer undue burdens if frivolous complaints are easy to file. Most importantly, the Commission's resources to deal with any non-frivolous complaints will be severely diluted. To minimize the potential for such misuse of the Commission's process, the Commission should continue to require that the proponent of a complaint maintain the burden of proof.

The Commission asks what showing is necessary for the issuance of a

cease and desist order under §274(e)(2). *NPRM* ¶80. Congress did not specify any particular standard other than a showing that "any act or practice of any Bell operating company, affiliate, or separated affiliate constitutes a violation of [§274]." We submit that it is inadvisable to attempt to prejudge what constitutes such a showing, for the same reasons given above against defining at this time a *prima facie* case. The Commission also asks if the evidentiary showing might be different for a claim for damages under §274(e)(1). *Id.* Because §274(e)(1) incorporates §206, it is clear that the showing of actual damages under §206 would be required.

In response to the Commission's inquiry regarding actions it could take to deter violations of, and facilitate prompt disposition of complaints under, §274, we recommend the Commission adopt the same requirements for complaints that we have suggested in the *In-Region NPRM.* To expedite the process and ensure the filing of meritorious complaints, the Commission should require the complainant to file more than a bare "notice-type" complaint. For example, the Commission should require the pre-filing of testimony, exhibits, and all other information relevant to support the claim, along with all requests for discovery. The opening case should only be supplemented with new, relevant material obtained through discovery.

B. Neither Shifting The Burden Of Proof Nor Other Procedural Changes Are Needed To Enforce Section 260 (¶¶81-84)

No new or different legal and evidentiary standards are needed to ensure a full and fair resolution of complaints filed under §260 within the 120-day statutory window. *See NPRM* ¶82. For the reasons indicated above, there are strong legal and policy objections to shifting the burden of proof onto the BOCs merely to expedite disposition of a complaint. Also, as explained above, it is inadvisable at this time to attempt to define what constitutes a *prima facie* case for relief under §260. We do urge the Commission to adopt stringent standards for complaints, as recommended in the *In-Region NPRM* and above for §274.

The showing of "material financial harm" required by §§260(b) and 275(c) (*see NPRM* ¶83) should be supported in the complaint by a complete showing, amounting to a *prima facie* case, consisting of probative factual testimony, supported by affidavit, demonstrating the magnitude of the alleged harm, the relationship of the alleged harm to the complainant's gross and net revenues and net profits, the direct causal relationship between the alleged violation and the alleged harm, and the impact of the alleged harm on the complainant's business prospects. While we hesitate to quantify what might be material, we submit that Congress intended harm that would threaten the business viability of the complainant. If the complainant's pleadings allege a violation of the nondiscrimination requirements of §260, but do not demonstrate material financial harm, the complainant is not entitled to an expedited review.

To issue a LEC an order "to cease engaging" in an alleged violation of §260, the Commission must conclude by a preponderance of the evidence that a LEC has

violated §260(a) and that such violation was the proximate cause of the complainant's material financial harm. The Commission's authority to issue an order "to cease engaging" under §§260(b) is more limited than the authority to issue a cease and desist order under §274(e)(2) because of the requirement for material financial harm.

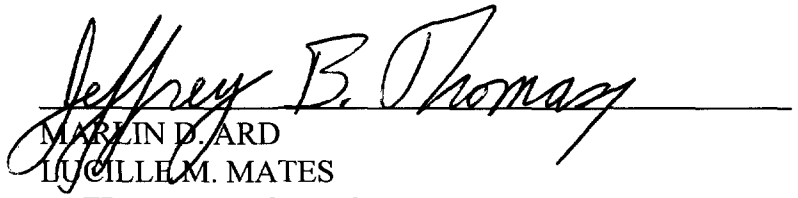
There are no additional actions the Commission should take to deter violations of, and facilitate the prompt disposition of, complaints under §260.

VI. Conclusion

For the reasons given, we urge the Commission to adopt the clarifications and policies presented above in order to achieve Congress's goal of bringing more and better services to the American public at lower cost. Regulations beyond those specifically required in the 1996 Act would be contrary to that goal.

Respectfully submitted,

PACIFIC TELESIS GROUP



MARLIN D. ARD
LUCILLE M. MATES
PATRICIA L. C. MAHONEY
JEFFREY B. THOMAS

140 New Montgomery Street, Rm. 1529
San Francisco, California 94105
(415) 542-7661

Its Attorneys

Date: September 4, 1996
0144544.01